

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

In re:	)	
	)	
LEWIS S. LAURIA, III	)	Case No. 00-10550-SSM
	)	Chapter 7
Debtor	)	

**MEMORANDUM OPINION**

A hearing was held in open court on April 16, 2002, on the amended final report and proposed distribution to creditors filed by Ann E. Schmitt, Trustee, on March 22, 2002. The trustee was present by counsel, as was the United States Trustee, who filed an objection to the original report.<sup>1</sup> The debtor was present in person and urged a reduction in the trustee's compensation.<sup>2</sup> For the reasons stated, the requested trustee compensation will be approved in part and disapproved in part.

Background

Lewis S. Lauria, III, is a self-employed building contractor. He filed a voluntary chapter 13 petition in this court on February 14, 2000. His attempts at confirmation of a

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<sup>1</sup> The original report was filed on February 26, 2002. The U.S. Trustee's objection was filed the same date.

<sup>2</sup> The debtor did not receive a discharge in this case because he had previously received a chapter 7 discharge in a case filed within six years of this case. *See* § 727(a)(8), Bankruptcy Code. Since he remains liable on his prepetition debts to the extent they are not paid by the trustee, and since the trustee's proposed distribution would not result in full payment of unsecured claims, the debtor has standing to object to the commission.

chapter 13 plan were unsuccessful, and the case was converted to chapter 7 on October 18, 2000. While not entirely clear from a review of the file, it appears that prior to conversion the debtor had located a purchaser for his home. The trustee, in any event, promptly moved to sell the property. The sales price was \$429,000.00. Two deed of trust were paid at settlement in the aggregate amount of \$331,739.25, which resulted in net proceeds of \$57,438.70 being paid to the trustee. Left unresolved at settlement was the first trust-holder's claim for a prepayment penalty. The trustee objected to payment of the prepayment penalty to the extent it exceeded 2% of the principal balance, the maximum amount permitted by Va. Code § 6.01-330.83. Based, however, on the decision in *National Home Equity Mortgage Assn. v. Face*, 239 F.3d 633 (4th Cir. 2001), the trustee ultimately conceded the first trust-holder's legal entitlement to the full prepayment penalty in its note and paid the lender an additional \$13,156.31. In any event, the trustee now has on hand \$45,122.78. From this sum the trustee proposes the following distribution:

Trustee commission	\$17,000.00
Trustee expenses	\$45.00
Trustee's attorney's fee	\$3,946.04
Debtor's attorney's fees and expenses	\$6,285.42
Priority claims (100% dividend)	\$10,729.55

Unsecured claims (19.49% dividend)<sup>3</sup>

\$7,116.77

By prior memorandum opinion and order, the court has allowed the fees and expenses of the debtor's attorney, John D. Sawyer, Esquire, in the reduced amount of \$4,290.42 (net of his retainer) rather than the \$6,285.42 requested. Accordingly, the only remaining issues before the court are the compensation of the trustee's counsel and the trustee's own compensation.

### Discussion

#### A.

The trustee, with court approval, was permitted to employ her own law firm, Reed Smith LLP, as her attorney in this case. As noted, Reed Smith has requested compensation and reimbursement of expenses in the amount of \$3,946.04. The billing records submitted in support of the application reflect a total of 14 hours at hourly rates ranging from \$200.00 per hour for associate time to \$350.00 per hour for partner time, equating to a "blended" rate of \$270.93 per hour. Additionally, the billing records reflect the incurrence of \$153.04 in expenses for postage, photocopying, and long distance. The bulk of the time related to factual and legal research and negotiations concerning the enforceability of the first trustholder's prepayment penalty claim. A small amount of time was devoted to the filing of a motion and the entry of an order denying the debtor a discharge.

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<sup>3</sup> The trustee's dividend calculation is based on \$36,512.71 in allowed unsecured claims. However, one of the unsecured creditors, John D. Campbell, has filed a letter with the clerk declining a distribution on account of his allowed \$4,871.50 claim. That reduces the pool of allowed general unsecured claims to \$31,641.21. With the reduction in the amount to be paid to the debtor's attorney, the amount available to pay the unsecured claims would be \$9,111.77. This would result in a 28.8% dividend on unsecured claims even if the trustee's claimed commission and the fees of her law firm were allowed in full.

In determining the amount of compensation to be paid to professionals of the bankruptcy estate, the court is required to consider “the nature, the extent, and the value of such services, taking into account all relevant factors.” § 330(a)(3), Bankruptcy Code.

Among the factors which must be considered are the following:

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

§ 330(a)(3)(A) through (E), Bankruptcy Code. In this connection, the U.S. Trustee has questioned whether the extensive research and negotiations concerning the prepayment penalty were justified. In retrospect, of course, the estate did not benefit from such work, as the trustee ultimately concluded that the first trust-holder was legally entitled to payment of the full amount demanded. At the same time, the amount in controversy – over \$13,000.00 – was not trivial, and the trustee had a good faith argument, based on the plain language of Va. Code § 6.01-330.83, that a prepayment penalty could not lawfully be charged in excess of 2%. Although the United States District Court for this district had held that the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801, *et seq.*, preempted the Virginia statute, *National Home Equity Mortgage Assn. v. Face*, 64 F.Supp.3d 584 (E.D. Va.

1999), that decision was on appeal to the Fourth Circuit at the time the property sale went to settlement on November 17, 2000. On February 7, 2001, however, the Fourth Circuit affirmed the District Court. *National Home Equity Mortgage Assn. v. Face*, 239 F.3d 633 (4th Cir. 2001), *cert. denied* 122 S.Ct. 58, 151 L.Ed.2d 26 (2001). The statutory standard for allowance of compensation, as noted above, requires the court to consider, among other factors, “whether the services were necessary to the administration of, or beneficial *at the time at which the service was rendered* toward the completion of, [the] case.” § 330(a)(3)(C), Bankruptcy Code (emphasis added). Having considered the circumstances, the court cannot find that it was unreasonable for the trustee to have incurred approximately \$3,800.00 in legal fees to challenge a \$13,156.31 claim when the legal basis for the claim was at least doubtful at the time the work was performed. The court has also considered the remaining factors under Section 330(a) and determines that compensation should be awarded to Reed Smith in the amount requested.<sup>4</sup>

B.

That leaves for consideration the compensation requested by the trustee. The compensation of trustees, like that of any other estate professional, is governed by Section

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<sup>4</sup> In a recent opinion, Judge Mayer reminded trustees that they are fiduciaries for the bankruptcy estate, and that court authorization to hire one’s own law firm does not constitute authorization to pay more than the prevailing local rate for competent legal representation, even if the trustee’s own law firm is accustomed to charging higher rates. *In re Powertrust.com, Inc.*, No. 02-80015-RGM (Bankr. E.D. Va., Mar. 21, 2002) (Memorandum Opinion). He opined that at the present time trustees could hire experienced bankruptcy counsel for general trustee representation in Alexandria at rates not exceeding \$265.00 per hour. *Id.* at 2. I agree entirely with Judge Mayer’s analysis but have not reduced the hourly rate charged by the highest-billing attorney (the trustee herself) in this case because the employment was undertaken prior to the release of Judge Mayer’s opinion and because the fees charged are relatively modest in any event.

330, Bankruptcy Code. However, a trustee's compensation is capped by Section 326, Bankruptcy Code, which sets forth a sliding scale based on the amount distributed to creditors. Specifically, Section 326 provides in relevant part as follows:

(a) In a case under chapter 7 or 11, the court may allow *reasonable compensation under section 330* of this title of the trustee for the trustee's services, payable after the trustee renders such services, *not to exceed* 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, *upon all moneys disbursed or turned over in the case by the trustee to parties in interest*, excluding the debtor, but *including holders of secured claims*.

§ 330(a), Bankruptcy Code (emphasis added). In the present case, the maximum compensation that could be awarded, based on the “moneys disbursed or turned over” to creditors and administrative claimants, would be \$24,744.87. The trustee, as noted is not seeking this amount but has voluntarily reduced her compensation request to \$17,000.00 plus reimbursement of \$45.00 in expenses.

The United States Trustee, however, argues that even \$17,000.00 is excessive compensation for the 22.5 hours expended by the trustee in carrying out her duties in this case. As the United States trustee correctly points out, the percentage scale in Section 326 is legally neither a presumptive fee nor a “statutory commission,” but rather a *limitation* on the compensation that might otherwise be awarded the trustee under Section 330. At the same time, it is rare in routine or smaller cases for trustees to be awarded less than the maximum amount allowed, so that in real life Section 326 is often treated as establishing, if not quite a legal presumption, at least a working presumption of appropriate compensation. But a

working presumption is only a rule of thumb, and it must give way when the circumstances do not justify a commission equal to the statutory maximum.

The trustee's efforts here will result in more than \$400,000 being paid to creditors and administrative claimants. Although most of that has gone to the two deed of trust holders, the sale did yield substantial funds that will provide at least a partial dividend to unsecured creditors. The trustee enjoys an enviable professional reputation, and she carried out her duties in this case in capable and efficient manner. On the other hand, the trustee was not required to engage in a lengthy sales effort with respect to the debtor's house but simply inherited a contract that the debtor had negotiated. Additionally, it was the debtor, through his attorney, who shouldered the burden of objecting to claims other than the prepayment penalty. The trustee's law firm, as noted, is being fully compensated for the work connected with challenging the prepayment penalty.

The United States Trustee points out that allowing \$17,000.00 in compensation for 22.5 hours of work would equate to \$755.55 per hour. The court agrees that the compensation, viewed in that light, is probably too high. At the same time, an appropriate hourly rate for trustee services must necessarily take into account the fact that not every case results in the recovery of funds. Put another way, there are many cases in which trustees are undercompensated for their efforts. The question is not whether the trustee's hourly compensation is high in a particular case, but whether it is high taking into account the trustee's universe of cases. At the same time, when creditors are receiving substantially less than 100 cents on the dollar, it is unfair to expect those creditors to subsidize the trustee's efforts in some other case.

Having carefully considered all the circumstances, the court determines that appropriate compensation for the trustee in this case is \$12,500.00 plus the claimed \$45.00 in expenses. This equates to an hourly rate slightly in excess of \$550.00 per hour and gives the trustee, in effect, a premium or risk multiplier of 1.57 over her normal hourly rate as an attorney. Such a premium is both appropriate to fairly compensate the trustee for her efforts in this case and adequate to provide an incentive for future cases.

C.

A separate order will be entered consistent with this opinion allowing compensation and reimbursement of expenses to Reed Smith in the amount claimed and compensation and reimbursement of expenses to the trustee in the amount of \$12,545.00. The amount available to pay unsecured claims will accordingly increase to \$13,616.77. With the withdrawal of the Campbell claim and the reduction in the Sawyer administrative claim, the resulting dividend on unsecured claims will increase to approximately 43%. With those changes, the trustee's final report and proposed distribution will be approved.

Date: April 17, 2002  
Alexandria, Virginia

/s/Stephen S. Mitchell  
Stephen S. Mitchell  
United States Bankruptcy Judge



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